No. 97-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

FURTHER STATEMENT OF FACTS

Contrary to the assertions at pp. 1, 23 of respondents' brief, (1) respondents contended below and the courts below found that the union, rather than petitioner, had sole authority to file grievances and that the union made the decision not to file a formal grievance in January, 1995[1]; (2) respondents contended below that the time within which the grievance process was available to contest respondents' refusal to accept petitioner for work began on January 12, 1995, and had expired within 48 hours, more than ten days before petitioner was able to retain private counsel on January 26, JA 55a ¶ 23; and (3) respondents admitted below that when petitioner sent them notice of his claim of discrimination, none of the respondents offered to grieve these claims or to discuss the claims with him (*e.g.*, under 29 U.S.C. § 159(a)), *id.*

SUMMARY OF ARGUMENT

At the end of the Term just concluded, in *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S. Ct. 2275 (1998), this Court endorsed two propositions that are dispositive of this matter. First, the Court emphasized the importance of applying *stare decisis* in following prior decisions of this Court construing Title VII. Since Congress enumerated the decisions of this Court that it chose to modify in the Civil Rights Act of 1991, 105 Stat. 1072, the vitality of other rulings that it chose not to modify in the 1991 Act has been reinforced. As with the decision in *Meritor Savings Bank FSB v. Vinson*,

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[1] The trial court found that, Pet. App. 16a, 18a: "Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants. . . . For whatever reason, his union chose not to pursue his claim."

477 U.S. 57 (1986), explicated in *Ellerth* and *Faragher*, Congress made no changes to the rule of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); instead, Congress expressly endorsed the continuing vitality of *Alexander v. Gardner-Denver Co.*[2]

Respondents argue, disingenuously, that they seek only to require "exhaustion of remedies," that they only wish to have victims of discrimination use contractual remedies -- as workers must when seeking to enforce a contractual right -- *before* going to court. But respondents clearly expect the court to defer to the grievance-arbitration decision, so that "going to court" would be futile, except in those cases where the worker could show that the union had acted "perfunctorily or in bad faith." *See* Resp. Br. at 22-23.

The National Labor Relations Act, which the NLRB has construed to compel such deferral for exhaustion of remedies, was enacted to protect the collective rights of workers, not the individual rights that are protected in federal employment statutes. NLRB deferral, like *Gilmer*, assures that the worker will at least get a hearing -- procedural default is not allowed. But respondents and their *amici* have argued that this Court should affirm the procedural default *enforced* on petitioner by the courts below. Seeking to enforce this procedural default demonstrates with absolute clarity the lack of regard that respondents and their *amici* have for the employees' rights that Congress enacted in the Americans with Disabilities Act and other statutes prohibiting discrimination in employment.

Second, also in *Ellerth* and *Faragher*, this Court emphasized that the "primary objective" of employment discrimination statutes is "to influence primary conduct, . . . not

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[2] Emphasis on *stare decisis* also focuses attention on the wide range of decisions in labor relations that respondents invite the Court to discard, in the guise of "updating" employment discrimination law in the unionized work place. *See* cases discussed *infra* pp. 12-15.

to provide redress, but to avoid harm." *Faragher*, 118 S. Ct. at 2292. *Ellerth* and *Faragher* implement these policies by imposing consequences on employers: redress for concealed as well as obvious discrimination must be easily accessible to victims, or employers will sustain liability for the discrimination. These policies are designed to "serve Title VII's deterrent purpose." *Ellerth*, 118 S.Ct. at 2270.

Respondents and their *amici* seek to impose new and additional hurdles to the enforcement of rights under employment discrimination statutes with procedures that would shift from employers to unions the major burden of enforcing these statutes. As this Court clearly recognized in *Ellerth* and *Faragher*, any rule that shifts responsibility away from the employer will undermine the deterrent purpose of employment discrimination statutes. Any such rules are virtually guaranteed to promote forfeiture of rights, either by procedural default (as in petitioner's case) or because the costs of pursuing all meritorious claims are prohibitive for unions. Such forfeitures are antithetical to the principles of voluntary choice of *forum* that this Court applied in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).

ARGUMENT

I. Applying *stare decisis*, *Alexander v. Gardner-Denver Co.* requires that the judgment below be reversed.

Throughout this litigation, petitioner has relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that the rights established by employment discrimination statutes are independent of any rights conferred by contract, and that the grievance-arbitration mechanism of a collective bargaining agreement does not apply to statutory claims. Respondents tacitly recognize that if *Alexander* controls, they lose; they argue that "*Alexander*'s legacy has fulfilled the need which created it, and its limitations on the use of arbitration under collectively-bargained agreements should be updated and

redefined" (Resp. Br. at 2-3). The U.S. Chamber of Commerce, *amicus curiae* supporting respondents, forthrightly recognizes that the issue is whether the Court should overrule *Alexander* (Br. at 2-3). Proper regard for *stare decisis* requires that *Alexander* be reaffirmed and the judgment below reversed.

A. The ADA incorporated the enforcement statute construed in *Alexander*, and Congress has enacted no change affecting *Alexander*.

In the Americans with Disabilities Act (ADA), Congress adopted the entire statutory mechanism enacted in Title VII for administrative and judicial enforcement of the protections against employment discrimination. 42 U.S.C. § 12117(a), adopting enforcement provisions of 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9. Pet. App. 32a. When Congress enacted the ADA, the key Committee Report explicitly stated "that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA." H.R. REP. No.101-485, pt. 3, at 77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 445, 500.

As this Court recently observed in *Ellerth*, 118 S.Ct. at 2270, quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." In this case, as in *Ellerth* and in *Faragher* (118 S. Ct. at 2286):

> the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.

In the Civil Rights Act of 1991, Congress explicitly addressed eight of this Court's decisions that had construed federal employment discrimination laws. Those decisions were

clearly identified in the statute or the legislative history. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994). Neither in the statute, nor in any of the legislative history, did Congress suggest that it intended to change the rule of *Alexander*; instead, the legislative history expressly stated that Congress understood that the amendments were "consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.* . . ." H.R. REP. No. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.[3]

B. *Alexander* held that resort to contractual grievance procedures was not a jurisdictional precondition to a suit on a federal statutory discrimination claim.

Alexander clearly rejected the contention that use of the collective bargaining agreement grievance-arbitration procedures

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[3] Any reasonable interpretation of the "ADR" Sections, 42 U.S.C. § 12212 and § 118 of the Civil Rights Act of 1991, must recognize that "alternative means of dispute resolution" would be "appropriate" only where adopted voluntarily, since every other ADR procedure listed will bind the parties only if they both accept the result *at the end of the procedure*: "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials . . . ." As this Court stated in *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990), "words grouped in a list should be given related meaning" (citations omitted); *see also Third Nat'l Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n.16 (1977). Since "arbitration" is "a word . . . capable of many meanings," reference to the context is necessary "to avoid the giving of unintended breadth [here, compulsory arbitration] to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This reading of the statutory sections is confirmed by a "section-by-section analysis" of the 1991 Act "representing the views of the administration" and fourteen Republican Senators that was placed in the legislative record shortly before the Senate approved the measure. That analysis took note of this Court's then-recent decision in *Gilmer* but emphasized that "[t]his provision [§ 118 of the Act] encourages the use of alternative means of dispute resolution, including binding arbitration, *where the parties knowingly and voluntarily elect to use these methods.*" 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1997 (emphasis supplied). *Compare* Pet. Br. at 47-48.

was jurisdictional, 415 U.S. at 47:

> Title VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 USC § 2000e-5(b), (e), and (f).

Since the grievance process has no relation to jurisdiction, "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration . . . ." 415 U.S. at 49. Under this statutory construction, the employee also does not forfeit his cause of action if he does not pursue his grievance at all. *See also Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (pursuing contract grievance does not toll the statutory time limits for filing a charge of discrimination).[4]

In *Alexander*, this Court also emphatically declared that the bargaining representative had no role in compromising the individual workers' statutory rights, which are completely independent of the bargaining process. 415 U.S. at 51-52:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, *the rights conferred can form no part of the collective-bargaining*

[4] Because the language in *Alexander* is clear and explicit, and Congress has never modified the rule, the fact that Alexander's union submitted his contract claim to arbitration (as did the union in *McDonald v. City of West Branch*, 466 U.S. 284 (1984)) does not limit the application of *Alexander* solely to cases that have been submitted to grievance-arbitration, as respondents assert, Br. at 26. In *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 731 n.6 (1981), several of the workers who prevailed in this Court had not submitted their claims to arbitration. See also cases cited in Pet. Br. at 18 n.6.

> *process* since waiver of these rights would defeat the paramount congressional purpose behind Title VII.
>
> * * * * *
>
> Since an employee's rights under Title VII may not be waived prospectively, *existing contractual rights and remedies against discrimination must result from other concessions already made by the union* as part of the economic bargain struck with the employer. [Emphasis supplied.]

The Court also rejected the argument that the district court should defer to the arbitral award, as respondents concede. Resp. Br. at 17. The Court found deferral inappropriate, *inter alia*, 415 U.S. 58 n.19, due to "the union's exclusive control over the manner and extent to which an individual grievance is presented . . . . [T]he interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit . . . . And a breach of the union's duty of fair representation may be difficult to establish." As discussed *infra* pp. 18-19, the cases show that a breach of the union's duty is *extraordinarily* difficult to establish.

No congressional action has called into question either of these holdings of *Alexander*: (1) that the statutory requirements for jurisdiction are exclusive, and do not include resort to the grievance-arbitration mechanism in a bargaining agreement,[5] so that neither exercising nor foregoing a grievance will forfeit statutory rights; and (2) that the statutory rights "form no part of the collective bargaining process," either in negotiation, or in adjustment of contract disputes, a process that must resolve conflicting interests of individual workers in the manner deemed best for the majority.

[5] Nothing in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), suggests that use of a grievance or arbitration procedure is *jurisdictional*, or that *Gilmer*'s failure to demand arbitration resulted in forfeiture of his right to a hearing on the merits of his claim under the ADEA.

1. The courts below enforced a rule of preclusion, not of "exhaustion of remedies."

Directly contrary to *Alexander*, the courts below held that the district court "lacked *jurisdiction*, Pet.App. 6a, and that the failure to grieve the statutory claim "precludes a court from exercising *jurisdiction*" (emphasis supplied). Pet.App. 4a. The courts below relied on *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996), which held that for claims under employment discrimination statutes, resort to "final and binding arbitration . . . . is obligatory" for workers covered by a collective bargaining agreement.[6] The district court in this case found the suit barred because the petitioner could not show that the union responded to his grievance "perfunctorily or in bad faith." Pet. App. 18a n.2. When the petitioner and the local union sought to submit the matter to arbitration, the courts below refused to retain jurisdiction to assure that the policies of the statute were respected. Pet. App. 5a. As a result, the courts below held, the local union's decision that a private suit was a better solution than a grievance had forfeited all of petitioner's statutory rights against respondents, including the right to present his claims in *any* forum.

2. Even if exhaustion were required, Petitioner did everything necessary to exhaust remedies through the union, and the respondents did not contend otherwise below.

The district court found that petitioner "initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendants." Pet. App. 16a. The court also found that "[f]or whatever reason, his union chose not to pursue his claim." Pet. App. 18a. Only parties to the

[6] *Austin* was based on the proposition that *Gilmer* had overruled *Alexander sub silentio*. *See* 78 F.3d at 880.

bargaining agreement could file and pursue a grievance, and the union, not petitioner, was a party to the agreement.[7] JA 55a ¶ 22; 36a ¶ 1; 47a. In both courts below, respondents agreed that petitioner promptly took proper steps to grieve the matter in January, 1995, but the "union chose not to pursue his claim."[8]

In this Court, respondents suggest that petitioner's request that the union assist him in returning to work did not adequately exhaust his grievance remedies, under the rule of *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Petitioner denies that the *Maddox* rule applies here, but if it applies, he met the standard that "the employee must afford the union the opportunity to act on his behalf." 379 U.S. at 653. Petitioner's request for assistance acknowledged "the union's status as exclusive bargaining representative . . . to participate actively in the continuing administration of the contract." *Id.*[9] As far as that agreement was concerned, petitioner personally could only present the matter to the union, which is exactly what

[7] *As a contract matter*, petitioner could not compel arbitration. *See Black-Clawson Co., Inc. v. International Ass'n of Mach.*, 313 F.2d 179, 184-86 (2d Cir. 1962), cited with approval in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 59 n.7 (1975).

[8] In the trial court, respondents filed an affidavit that "Local 1422 could have grieved the dispute concerning Ceasar Wright . . . ," 4th Cir. Jt. App. at 145 ¶ 9, and their counsel recognized that the union had chosen not to proceed, see JA 6a, Tr. of Hearing 11/19/96 at page 11. In the Court of Appeals, respondents acknowledged that "the union chose not to proceed with a formal grievance." See JA 9a, Brief of Appellees filed 4/22/97, at p.31.

[9] A verbal request to the union for assistance can be sufficient to exhaust contract remedies. *See, e.g., Cruz v. Local Union No. 3, IBEW*, 34 F.3d 1148, 1151-53 (2d Cir. 1994). In *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S. Ct. 1761, 1767 (1998), this Court recently noted that the policy grounds that require exhaustion of administrative remedies provided by statute do not apply to arbitral remedies provided by private parties. Here, the policy to be furthered was the worker's respect for the role of the union, and petitioner completely satisfied that policy.

he did. To require more than this of petitioner "would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

Respondents argue, in support of their exhaustion claim, that "Wright could have pressed his own grievance" (Resp. Br. at 23), either directly, under the proviso to 29 U.S.C. § 159(a), or by bringing a claim against the union for an unfair labor practice or a breach of the duty of fair representation. The latter methods of redress by establishing union misconduct simply could not apply in this case, as explained in Pet. Br. at 29, 37. As to whether petitioner could have "pressed his own grievance," the present record does show that when petitioner notified respondents of his ADA complaint, none of them suggested that he discuss a grievance directly with the employers or their association. JA 55a ¶ 23.

3. *Alexander* also established that rights under Title VII and related employment discrimination statutes are not proper for "deferral" to arbitration.

In *Alexander*, 415 U.S. at 55-59, this Court considered and unanimously rejected the argument that the federal courts should defer to an arbitral award if the contract contained a "nondiscrimination" clause, as did the bargaining agreement in that case. Here, the agreement did not even contain a "nondiscrimination" clause.[10] Even as they acknowledge that

[10] Since this agreement has no "nondiscrimination" clause, petitioner had no contract rights as an "individual with a disability" to be free from discrimination. The "savings clause" of the contract did not incorporate into the agreement any affirmative obligations, either under the ADA or under any other statute. The contract therefore provided no right to the "reasonable accommodation" required by the ADA, JA 16a ¶ 26, and an arbitrator would have had no basis in the contract for ordering an accommodation.

Alexander rejected deferral, Resp. Br. at 17, respondents urge this Court to impose on statutes that "provide minimum substantive guarantees to individual workers," *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981), the deferral rules the National Labor Relations Board has adopted for administering unfair labor practice charges that assert violation of collectively based rights under the National Labor Relations Act. *Hammontree v. NLRB*, 925 F.2d 1486, 1490-91 (D.C. Cir. 1991).

Assuming *arguendo* that the Board has correctly construed the NLRA to authorize deferral, as the court of appeals held in *Hammontree*, such a rule has no application to claims under employment discrimination statutes, as the EEOC (the agency charged with construing and enforcing both Title VII and the ADA) has recognized.[11] The court of appeals noted in *Hammontree* that the rules of deferment were unique to the provisions of the NLRA, designed to protect employees in the exercise of their rights to collective action, and these rules did not apply to Title VII, the FLSA, and other statutes that protect workers without regard to collective activity. "In the NLRA, Congress clearly did not seek to segregate private dispute resolution as a remedy 'separate from and independent of' statutory remedies." 925 F.2d at 1497. Further, the key issue in *Hammontree* was whether pre-arbitral deferment -- ordering the parties to arbitrate before the Board would review the ULP charge -- was a permissible exercise of the Board's broad discretion in construing the NLRA. To apply the *Hammontree*

[11] The only cases in which deferral has been approved where "statutory" claims are at issue are cases relating to workers' *collective* rights under the NLRA or LMRA. *See, e.g., Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 385-87 (1974). (LMRA; work stoppage for safety reasons is not protected under § 502, 29 U.S.C. § 143, unless union presents "objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.")

rule to the Title VII enforcement mechanisms (also applicable to the ADA) would require this Court to overrule *Alexander*.

Even if there were any reason to consider applying the NLRB's deferment policy to Title VII/ADA claims, respondents have rejected such an application by their own actions in this case, in repeatedly refusing to arbitrate petitioner's grievance. The respondents' brief, at p.16, cites the Board's rule that deferment will only be considered where "the employer has asserted its willingness to utilize arbitration to resolve the dispute," quoting *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984). See also *Hammontree*, 925 F.2d at 1490. In light of this rule, it is frivolous to suggest that the federal courts should "defer" to the respondents' *refusal* to arbitrate petitioner's claims.

C. *Stare decisis* also compels the conclusion that a "general arbitration clause" in a collective bargaining agreement does not cover employees' claims under statutes that protect employees as individuals.

Respondents concede that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'" *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S.Ct. 1761, 4767 (1998); see Resp.Br. at 48. The bargaining agreement in this case, negotiated in 1990, before the *Gilmer* decision, JA 36a, was never intended to apply to claims of individual workers under the ADA and other federal employment statutes prohibiting discrimination.

Respondents do not argue (nor do their *amici*) that petitioner ever bound himself individually to arbitration, nor does anyone argue that the union subjectively intended to submit statutory employment discrimination claims to the grievance mechanism. Petitioner is aware of no individual claims under

these statutes that have ever been grieved under this agreement.[12] *Cf.* Pet. Br. at 17.

Rather, respondents' position is that the same "presumption of arbitrability" that attaches to disputes between union and management over interpretation of contract terms (Resp. Br. at 12-13) should also apply to disputes between a worker and his employer arising under federal statutes that protect the worker as an individual. To enforce *collective* rights, Congress in the Labor Management Relations Act, 29 U.S.C. §§ 171 *et seq.*, enacted a "liberal federal policy favoring arbitration agreements." Respondents argue that this same policy should be extended to petitioner's claim to enforce an *individual* right (Resp. Br. at 12-13). But this fails to address the decisions of this Court ruling that the labor policy favoring arbitration has no application to the claims of individuals under statutes directed at all workers, whether organized or not.

First, even in cases where the language of the arbitration clause has been at least as broad as the language here, this Court has not applied the "presumption of arbitrability" to statutory claims. *Barrentine*, 450 U.S. at 736-37 (agreement required "that 'any controversy' between the parties to the agreement be resolved through the binding contractual grievance procedures").[13]

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[12] In its Brief *Amicus Curiae* at p. 3, the National Association of Waterfront Employers asserts that the longshore industry relies on arbitration to "resolve disputes that involve individual statutory employment claims." However, in its discussion, the Association provides no examples where such claims have ever been arbitrated.

[13] If, as respondents argue (Br. at 29), this Court reached this result because "[t]he contract in *Barrentine* was quite vague regarding what issues could be grieved and arbitrated . . . ," then this contract is even more vague, and its arbitration clause likewise cannot be read to apply to individual statutory claims of discrimination. The Arbitration Clause in this contract (Clause 15.(B)) has *no definition* of the scope of "matters under dispute."

Further, a "grievance" subject to collective bargaining processes is by definition a dispute "between union and employer with respect to the interpretation and application of the agreement." *United Paperworkers Inter. Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (LMRA). "When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator." *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 764 (1983). *See also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (Railway Labor Act). Even in the *Hammontree* decision, the court of appeals recognized that the issue in dispute could be the subject of a grievance only because the employee's "discrimination claim . . . is also actionable under the contract." 925 F.2d at 1493. Thus, contrary to respondents' assertion, Br. at 18-19, the court in *Hammontree* did not reject the petitioner's position that § 203(d) of the LMRA limits the definition of a "grievance" to disputes about interpretation of the contract. *See* Pet. Br. at 17-21.

Finally, this Court has held that public law claims under statutes protecting individual workers are not subject to the grievance-arbitration mechanism where the agreement itself includes no language expressing a "clear and unmistakable" intent to use the grievance mechanism for claims under such statutes. *See Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994).[14]

While respondents assume that all topics mentioned in the "zipper clause" (Clause 15.(F)) are intended to be within the scope of the Arbitration Clause, that is never explicitly stated in the contract. Indeed, the "zipper clause" provides that "anything not contained in this Agreement shall not be construed as being part of this Agreement," JA 46a. If that clause defines the scope of an arbitrator's authority, that authority is limited to the explicit contract terms.

[14] As we argued in Pet. Br. at 47-48, considerations of public policy requiring the knowing and voluntary waiver of individual rights would prevent this result in any case. But the question is not presented here.

Petitioner has found no cases that ever found a "clear and unmistakable" waiver of a judicial forum for public law rights protecting individual workers (see Pet. Br. at 46), and respondents cite none.

As with *Alexander*, these decisions are entitled to respect under the doctrine of *stare decisis*. These decisions teach that statutory claims of individual workers under antidiscrimination statutes are not within the scope of a general arbitration clause that does not define "grievances" but refers generally to "Matters under dispute which cannot be promptly settled between the Local and an individual Employer." Clause 15.(B). JA 43a. Since respondents (and their *amici*) completely ignore these cases, no one has offered this Court any rationale for departing from these settled rules for determining the application of grievance mechanisms to claims under statutes that protect employees as individuals. Thus respondents offer no basis to justify the extensive revision of long-settled labor law precedents of this Court that would be required in order to apply decisions about commercial arbitration, such as *Gilmer*, to the labor grievance-arbitration process.

II. Overruling *Alexander* would undermine the ADA's deterrent purpose of avoiding harm by making it more difficult for individual victims of discrimination to obtain remedies against employers that discriminate.

In *Ellerth*, 118 S. Ct. at 2270, this Court noted the deterrent purpose of Title VII, a purpose which applies equally to the ADA. In order to realize that deterrent purpose, those who would practice discrimination must have a realistic expectation that the victims of their unlawful conduct have available to them effective processes for obtaining remedies. Thus, for example, in the Civil Rights Act of 1991 Congress made a "considered decision on the subject" of "the proper allocation of the costs of" unlawful conduct, *Faragher*, 118 S.

Ct. at 2291 n.4. Specifically, in endorsing *Alexander*, Congress approved the allocation this Court made of the costs of discrimination by guaranteeing access to a judicial forum for the victims of discrimination in which to seek compensation from the primary wrongdoer.

The ruling below, that respondents support, drastically changes this balance and weakens the deterrent potential of the statute. It creates an incentive for employers, even when they are directly or vicariously liable for the discrimination, *see Ellerth* and *Faragher*, to minimize their potential remedial exposure by interpreting general grievance procedures in collective bargaining agreements to cover individual statutory claims, particularly when the union has not pursued a grievance, as in this case.[15] And it erects as a barrier to the victim's access to *any* forum the requirement of securing assistance from a collective bargaining representative that may have serious conflicting interests.

Here, as in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 294 (1997), the Court has received "honey-tongued assurances of the employers' able counsel and their *amici* . . . . that there is no genuine conflict between employer and employee interests" in allowing employees to "be required by agreement to arbitrate statutory claims" (Resp. Br. at 2).[16] But respondents have not

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[15] If a union refuses or is unable to pursue an individual's claim of discrimination in the grievance process, or so incompetently handles the matter as to breach its "duty of fair representation," the employer's liability is limited to the pre-grievance period. *See Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983).

[16] Respondents appear to approve "compulsory arbitration," which they agree to define as follows: "the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related claims in a judicial forum" (Br. at 42, quoting *Duffield v. Robertson Stephens & Co.*, ___ F.3d ___, 76 FEP Cas. 1450, 1453 (9th Cir. May 8, 1998)). A stark example of such an arrangement was recently endorsed by the Fourth Circuit in *Johnson v. Circuit City Stores, Inc.*, ___ F.3d ___, 77 FEP Cas. 139 (4th Cir. July 1, 1998), where the application for employment absolutely conditioned hiring on an agreement to arbitrate disputes, and an agreement that "I may not file a lawsuit in court." The application further stated: "If you have decided **not** to agree to the terms of the preceding DISPUTE RESOLUTION AGREEMENT then you do not need to complete the balance of this application. We appreciate your interest in the company." *See also Hooters of America, Inc. v. Phillips*, 76 FEP Cas. 1757 (D.S.C. March 12, 1998).

denied that unions face many conflicting demands for use of their resources (see Pet. Br. at 26-28),[17] nor have they denied the obvious fact that a union would have a conflict of interest when the union itself or a co-worker represented by the union is accused of discrimination.[18] Respondents also do not deny that a worker must meet a very rigorous burden to show a breach of the "duty of fair representation." See Pet. Br. at 28, 37. In this case, for example, although the district court found that the union's view of available remedies was mistaken, the court also found that the union did not decline to press petitioner's grievance "perfunctorily or in bad faith" and therefore petitioner's lawsuit was barred. Pet. App. 18a n.2.

Nor have respondents pointed to any inaccuracies in petitioner's discussion of the deficiencies of the grievance

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[17] In the district court, respondents argued that petitioner's "interest in having his grievance arbitrated cannot override the interest of his fellow Longshoremen to expend their dues money in other ways." Dk. Entry #39 at p.7.

[18] While progress has been made in the extent to which labor organizations oppose discrimination, unions continue to appear as defendants in employment discrimination suits, including in cases that allege harassment by co-workers who are also represented by the union. *See, e.g., Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440 (D. Ore. 1997), and *Wright v. Over-the-Road & City Transfer Drivers, etc.*, 945 S.W.2d 48 (Mo. App. 1997). See also Pet. Br. at 26.

mechanism as an exclusive forum for resolving statutory disputes: its short time limits, lack of counsel, limited remedies, and procedures that provide much less protection than the procedures approved in *Gilmer* (procedures that are overseen by the Securities and Exchange Commission). Under the subject agreement, respondents do not deny that the employee may be barred from a hearing, even if his local union presses for arbitration. See Pet. Br. at 31-36.[19]

Decisions in the trial courts applying *Austin* demonstrate that all of these policy concerns are valid and compelling. *See, e.g., Moore v. Duke Power Co.*, 971 F. Supp. 978, 980, 983, 985 (W.D.N.C. 1997), in which "[t]he Union representative allegedly told Plaintiff he would address Plaintiff's disability claims in the arbitration, but then declined to do so and also prevented Plaintiff's attorney from participating in the arbitration." Notwithstanding these facts, in *Moore* the district court enforced the arbitrator's denial of the grievance and held that, even though the disability claim had been omitted by the union from the arbitration, the union had not handled the

[19] If an employer wishes to resolve a dispute through the contractual grievance-arbitration mechanism, or through an agreement with the unionized worker for some other alternative means of dispute resolution, that may always be done by post-dispute agreement, as this Court endorsed in *Alexander*, 415 U.S. at 55. An employer and a union may also, under the NLRA and RLA, negotiate a pre-dispute collective agreement providing for a system of arbitration in which each employee may bring and present his individual statutory claims on a voluntary basis, and into which employees may opt on an individual basis. This Court recently reiterated the potential usefulness of voluntary non-judicial remedies in *Air Line Pilots Ass'n v. Miller*, ___ U.S. ___, 118 S. Ct. at 1769, citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 n.15 (1982): "under a '"free market" system' of no required exhaustion, 'litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective.'" Such use would frequently be appropriate when the claimed injury had small value. When these circumstances occur, both employees and employers have great economic incentive to utilize contract remedies rather than the courts.

grievance "perfunctorily or in bad faith" or in a "grossly deficient manner" so that plaintiff had no claim for breach of the duty of fair representation. Therefore, he could not bring his ADA claim before the court.

In the present case, in *Moore*, and in many other cases in federal district courts controlled by *Austin*, the result of imposing the grievance mechanism on statutory claims has been a complete forfeiture of those claims.[20] Such a result is the antithesis of the practice in commercial arbitration of the sort involved in *Gilmer*: there, a complaining party is simply required to proceed before the arbitrator rather than forfeiting the right to present his claim in *any* forum. In spite of the paramount national purposes of statutes prohibiting employment discrimination, neither respondents nor their *amici* consider forfeiture of claims to be of even questionable validity.

Any rule that substantially reduces the likely cost of a violation for the wrongdoer will likewise substantially reduce the deterrent effect of the statutory remedy. Congress, in approving the rule of *Alexander*, rendered a "considered decision" on the "proper allocation of the costs" of discrimination. *Faragher*, 118 S.Ct. at 2291 n.4. In order to "avoid harm" by maximizing the influence of the ADA on the employers' "primary conduct," this Court should reaffirm *Alexander* and reject respondents' invitation to overrule it.

[20] *See, e.g., Bright v. Norshipco.*, 951 F. Supp. 95 (E.D. Va. 1997), *aff'd*, 133 F.3d 913 (4th Cir. 1998) (table) (district court lacked jurisdiction over ADA claim even though CBA provided that "Nothing contained in this Article shall preclude any employee from exercising his/her rights under federal and state law"); *Turner v. Bell Atlantic-Virginia, Inc.*, 1997 WL 687707, 1997 U.S. Dist. LEXIS 11192 (W.D. Va. May 5, 1997) (union initially demanded arbitration of grievance but withdrew demand without plaintiff's consent; plaintiff held barred because she did not take an internal union appeal to challenge withdrawal of grievance); *Hampton v. Kroger Co.*, 1996 WL 560306, 1996 U.S. Dist. LEXIS 14407 (W.D. Va. Sept. 27, 1996).

CONCLUSION

In *Ellerth* and *Faragher*, this Court has recently held that rules for enforcing federal employment discrimination laws should fairly implement the deterrent purposes of the statutes, to avoid harm by influencing the primary conduct of employers. The "bright-line" rule of *Alexander v. Gardner-Denver Co.*, *Barrentine v. Arkansas-Best Freight Systems, Inc.*, and *McDonald v. City of West Branch* have served this deterrent purpose well, by preserving the right of employees to proceed to court to enforce the statutes, if non-judicial remedies do not prove satisfactory.

Congress has considered the rule of *Alexander* several times and endorsed it every time. The rule includes the observation, 415 U.S. at 55, that, since "the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practice," employees may satisfactorily resolve complaints of discrimination with the union's assistance, as petitioner initially sought to do. Petitioner would have been happy to utilize alternative dispute resolution to end this matter; it is respondents who still seek to enforce a forfeiture of petitioner's rights.

The respondents' recalcitrance is a classic example of why the rule in *Alexander* was right when decided, and remains right today. *Alexander* should be reaffirmed. The judgment below should be reversed.

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